

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

MALLINCKRODT INC. and LIEBEL-
FLARSHEIM COMPANY

Plaintiffs,

vs.

E-Z-EM, INC. and ACIST MEDICAL
SYSTEMS, INC.

Defendants.

CASE NO. 2:07-CV-262-TJW

JURY TRIAL DEMANDED

**PLAINTIFFS' SUPPLEMENTAL MOTION IN LIMINE (NO. 14) TO PRECLUDE ANY
EXPERTS BEYOND THE MAXIMUM NUMBER PERMITTED IN THE COURT'S
DISCOVERY ORDER**

Contrary to the Court's Order, Defendants (collectively, "E-Z-EM") are apparently relying on at least seven expert witnesses. Plaintiffs file this Supplemental *Motion in Limine* (No. 14) in light of new expert reports filed by E-Z-EM late Friday night, May 21, 2010. Plaintiffs could not file this Motion before the deadline, as E-Z-EM had not previously provided the expert reports nor disclosed its new experts. Plaintiffs met and conferred earlier today and are now filing this motion as expeditiously as possible.

Under this Court's Discovery Order, the parties are limited to "5 expert witnesses per side." (Dkt. No. 32 at 4). On its pretrial witness list, E-Z-EM discloses seven experts for trial, including three technical experts, two financial experts, and two patent law experts. (Dkt. No. 583, Ex. D).

These witnesses including the following:

- Dr. Alois Langer (E-Z-EM's technical expert)
- Dr. Vijay Madisetti (E-Z-EM's technical expert)
- Bruce Webster (E-Z-EM's technical expert)

- Serge Wurman (E-Z-EM financial expert)
- Nicholas P. Godici (E-Z-EM's patent law expert)
- Brian Napper (E-Z-EM's financial expert)
- Alan Gordon (E-Z-EM's patent law expert)

Id. This number does **not** include E-Z-EM's claim construction experts, i.e., Dr. Langer and another expert (Professor David Yerkes). (Dkt. No. 271, Exs. 6-8). If claim construction experts were counted in the limit, E-Z-EM would have eight experts. Collectively, E-Z-EM's experts have produced thirteen separate reports in this case (excluding any supplements).

By comparison, Plaintiffs are relying on two experts: one technical expert (Dr. Helmicki), and one damages expert (Alan Ratliffe), with a possible third expert for rebutting E-Z-EM's inequitable conduct report. Plaintiffs did not rely on any experts in conjunction with claim construction.

The Court's Order precludes more than 5 experts per side, and there is no basis for increasing that limit at this late stage. This case involves one patent with only two independent claims. E-Z-EM disputes very few claim limitations for its non infringement arguments. E-Z-EM's invalidity experts only rely on seven alleged prior art references.

For the reasons set forth above, Plaintiffs ask that the Court (i) strike any expert report(s) from Messrs. Napper and Gordon, (ii) preclude any other witness from relying on those reports, and (iii) preclude those additional experts from testifying at trial.

DATED: May 25, 2010

Melissa Richards Smith
Texas State Bar No. 24001351
GILLAM & SMITH, L.L.P.
303 S. Washington Avenue
Marshall, TX 75670
Telephone: (800) 304-9731
Facsimile: (903) 934-9257

By: /s/ Guy Ruttenberg
Robert G. Krupka, P.C. (CA State Bar No. 196625)
Guy Ruttenberg (CA State Bar No. 207937)
KIRKLAND & ELLIS LLP
333 South Hope Street
Los Angeles, California 90071
Telephone: (213) 680-8400

Email: melissa@gillamsmithlaw.com

Facsimile: (213) 680-8500

Email: guy.ruttenberg@kirkland.com

Attorneys for Plaintiffs
MALLINCKRODT INC. and LIEBEL-
FLARSHEIM COMPANY

CERTIFICATE OF CONFERENCE

Plaintiffs' counsel met and conferred with Defendants' counsel on May 25, 2010. Defendants counsel promised to inform us by the end of the day whether or not they will withdraw these additional experts. Thus far, we have not heard a response.

/s/ Guy Ruttenberg

Guy Ruttenberg

CERTIFICATE OF SERVICE

I, Guy Ruttenberg, certify that on May 25, 2010, the document described as **PLAINTIFFS' SUPPLEMENTAL MOTION IN LIMINE (NO. 14) TO PRECLUDE ANY EXPERTS BEYOND THE MAXIMUM NUMBER PERMITTED IN THE COURT'S DISCOVERY ORDER** was filed electronically in compliance with Local Rule CV-5(a). Therefore, this document was served on all counsel who are deemed to have consented to electronic service. Local Rule CV-5(a)(3)(A). Pursuant to Fed. R. Civ. P. 5(d) and Local Rule CV-5(e), all other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of this document via email, facsimile, and/or U.S. First Class Mail this 25th day of May, 2010.

Executed on May 25, 2010.

/s/ Guy Ruttenberg
Guy Ruttenberg